No. 93-639

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

*Petitioner,*

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

*Respondent.*

**On Writ Of Certiorari**
**To The District Court Of Appeal**
**Of Florida For The First District**

## BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC. IN SUPPORT OF PETITIONER

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## BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC. IN SUPPORT OF PETITIONER

### CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Professional Regulation, Board of Accountancy, have consented to the participation of the American Association of Attorney-Certified Public Accountants, Inc. in these proceedings as amicus curiae in support of Petitioner. Their consents have been filed with this Court.

## INTEREST OF AMICUS CURIAE

The American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA" or "the Association") is a not-for-profit corporation, formed in 1964 and now headquartered in California, with members located all over the United States. Every member has been licensed as both an attorney and a certified public accountant ("CPA").

AAA-CPA is dedicated to ensuring that its members observe the highest professional and ethical standards in service to their clients and the public. At the same time, AAA-CPA supports the right of practitioners to disclose truthful information about their qualifications, and to engage in the practice of either or both of their professions.

AAA-CPA is active in advocating the rights of individuals, such as its members, who are dually licensed both as attorneys and as CPAs. The Association asserts the right of these individuals to identify themselves as being licensed to practice both professions, and to engage in the practice of either or both, provided these individuals comply with the applicable standards of professional conduct.

AAA-CPA is in a unique position to appreciate the differences between the professional duties of attorneys on the one hand and CPAs on the other. Because of these differences in professional duties, the state has a legitimate interest in regulating each profession by a distinctive set of standards. These standards are similar in some respects and different in others. Depending on the nature of the engagement, dual licensees must comply with one



set of standards, or the other, or both. Dual licensees can discern and conform to the applicable set of standards, in much the same way as attorneys engaged in the multistate practice of law can discern and conform to the standards of each applicable jurisdiction.

Although one set of standards governs attorneys and another set governs CPAs, a single pervasive principle applies with equal force to the regulation of each profession: The state should impose no restriction unless required by the public interest. When the regulation affects truthful speech, the applicable test is even more stringent: The state should impose restrictions only in narrowly defined situations and only in response to a demonstrated need to protect a substantial public interest.

In the decision in this case, the Florida Board of Accountancy reprimands Silvia Ibanez for identifying herself as a CPA and CFP (Certified Financial Planner), although she is in fact a CPA, a CFP, and an attorney. The Board's actions violate Ibanez's First Amendment rights and endanger the rights of all practitioners who hold more than one professional license. AAA-CPA supports the position of Ibanez, in asking this Court to reverse the judgment of the Florida District Court of Appeal which, without opinion, affirmed the Board's decision.

## SUMMARY OF ARGUMENT

The Board violates Ibanez's commercial speech rights by imposing discipline for her truthful and verifiable listing of professional credentials. The Board improperly

characterizes Ibanez's listing of the credential "CPA" as "deceptive," although the Board concedes she is licensed as a certified public accountant. The Board bases its action on speculation that Ibanez, in the conduct of her law practice, may violate the Board's rules on the management of public accounting practices. By listing her professional credentials, however, Ibanez makes no representation regarding the regulatory regime that applies to her.

The Board's action chills the First Amendment rights of all attorney-CPAs and other individuals who hold more than one professional license. Experience shows that the public interest can be effectively protected without impairing First Amendment rights.

This Court should maintain the protection of commercial speech, and clarify it to the extent required to provide relief to Ibanez.

## ARGUMENT

In the decision at issue in this case, the Florida Board of Accountancy ("the Board") reprimands Silvia Ibanez ("Ibanez") for identifying herself as a Certified Public Accountant ("CPA") and a Certified Financial Planner ("CFP"), although the Board concedes she is a CPA, a CFP, and an attorney.

This brief of amicus curiae, the American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA"), focuses on Ibanez's right to identify herself as a CPA. By focusing on this issue, the brief avoids needless



overlap with the brief of another amicus curiae which focuses on Ibanez's right to identify herself as a CFP.[1]

The Board improperly characterizes Ibanez's truthful and verifiable identification – as a CPA – as "deceptive, false and misleading." This characterization is based only on the Board's speculation that Ibanez may violate the rules which, according to the Board, require her to license her law firm as a CPA firm, to forego certain forms of remuneration, and to limit the ownership of the firm to other CPAs. Joint Appendix ("J.A.") at 185. By characterizing truth as deception and by imposing discipline on this basis, the Board impairs Ibanez's First Amendment rights and endangers the rights of all practitioners who hold more than one professional license.

### I. THE BOARD VIOLATES IBANEZ'S COMMERCIAL SPEECH RIGHTS BY IMPOSING DISCIPLINE FOR HER TRUTHFUL AND VERIFIABLE LISTING OF PROFESSIONAL CREDENTIALS

In its order reprimanding Ibanez, the Board acknowledges that she is licensed as a CPA. The Board concludes,

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[1] The International Board of Standards and Practices for Certified Financial Planners, Inc. (IBCFP) filed a brief as amicus curiae in support of Ibanez's petition for writ of certiorari. IBCFP is expected to file an amicus curiae brief on the merits in support of Ibanez's right to identify herself truthfully as a CFP. AAA-CPA joins IBCFP in supporting her right to do so, based on commercial speech decisions such as *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990) and *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993).

however, that her truthful and verifiable identification as a CPA is "deceptive, false and misleading." J.A. at 186. This conclusion violates Ibanez's First Amendment right to engage in commercial speech.

### A. The Board Misapplies Case Law

The Board's order cites a number of cases to justify its action. The Board's reliance on these cases is misplaced.

#### 1. This Court's cases on commercial speech

First, the Board relies on this Court's decisions in *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990), *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 (1980), and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). For reasons stated in Ibanez's brief, none of the above decisions support the Board's action.

The Board's decision is further undermined by this Court's subsequent decision in *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993), also discussed in Ibanez's brief. To avoid needless overlap, this amicus curiae brief will not further discuss these cases.

In its Brief in Opposition to Certiorari, the Board relies also on *Friedman v. Rogers*, 440 U.S. 1 (1979). The Board's reliance on this case is equally erroneous. *Friedman* arose from a prohibition against the use of potentially deceptive trade names. This Court distinguished trade names from other commercial speech, noting that



trade names have "no intrinsic meaning." 440 U.S. at 12. In contrast, Ibanez listed her own name, together with professional credentials that have a clear meaning and are in no way deceptive. Accordingly, *Friedman* provides no justification for the Board's decision.

#### 2. Other courts' cases on title acts

The Board relies also on a number of lower court decisions arising from statutes described as "title acts," which prohibit unlicensed persons from using professional titles. J.A. at 181, 184, 189. None of these cases, however, supports the Board's position.

The Board relies on *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992) (state may prohibit unlicensed psychologist from identifying publicly as "licensed psychologist," but same individual has First Amendment right to identify publicly as "psychologist"); *Accountants' Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988) (state may prohibit unlicensed accountant from identifying publicly as "certified public accountant," "CPA," or "public accountant"); *Smith v. California*, 336 F.2d 530 (9th Cir. 1964) (state may prohibit unlicensed engineer from identifying publicly as "electrical engineer" or "consulting engineer").

These three cases uphold the right of a state legislature to prohibit *unlicensed* persons from using certain professional titles. That proposition is not disputed in the present case. None of the cases relied on by the Board allow the state to prohibit a *licensed* person from using

her titles. Accordingly, the cases do not support the Board's order.

In its Brief in Opposition to Certiorari, the Board relies on two additional lower court cases: *Gandee v. Glaser*, 785 F. Supp. 684 (S.D. Ohio 1992) and *United States v. DeFusco*, 930 F.2d 413 (5th Cir.), *cert. denied* ___ U.S.___, 112 S. Ct. 239 (1991). Its reliance on these cases is equally misplaced. *Gandee* upheld the right of the state to prohibit unlicensed persons from identifying themselves as "audiologists," while *DeFusco* upheld the right of the United States to prosecute a person for distributing material that misled the addressees into believing they had won a contest. Neither *Gandee* nor *DeFusco* pertains in any way to Ibanez's right to list her professional credentials truthfully.

### B. Ibanez's Truthful and Verifiable Listing of Credentials Is Not A Representation Regarding the Regulatory Regime Governing Her Practice

The independent hearing officer who conducted the trial-type hearing concluded that Ibanez's listing of her credentials was not misleading or deceptive. J.A. at 184. The Board rejected the hearing officer's recommendation and concluded, to the contrary, that Ibanez's listing of her credentials was "deceptive, false and misleading." J.A. at 186. In essence, the Board's explanation for its action has two components: (1) By publicly identifying herself as a CPA, Ibanez represents to the public that she will comply with all of the Board's rules; and (2) the Board speculates that Ibanez may violate some of its rules on the management of public accounting practices. In the Board's own words, J.A. at 185:



> Respondent [Ibanez] has, in effect, told the public that she is subject to the provisions of Chapter 473 [the Florida Accountancy Law], and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not [footnote omitted].

#### 1. Truthful and verifiable, not deceptive

The Board's explanation is untenable. By publicly identifying herself as a CPA, Ibanez merely represents that she now holds a valid license which authorizes her to use that title. Since the Board concedes that she holds a valid license, the Board has no basis for impairing her right to identify herself publicly as a CPA, or for characterizing her identification as deceptive. Her public identification is truthful.

It is also easily verifiable. Any interested person can consult public records or place a telephone call to the Board to verify that Ibanez is indeed a CPA, and to ascertain the legal significance of that license. Ibanez's public identification as a CPA is therefore a truthful and verifiable statement, protected by the First Amendment. *Peel, supra; In re R.M.J.*, 455 U.S. 191 (1982).

#### 2. Public identification, not representation regarding regulatory regime

Ibanez's public identification as an attorney and a CPA is not a representation regarding the regulatory regime governing her professional practice. Defining the appropriate regime may be a complex matter which cannot feasibly be conveyed by the listing of professional credentials.

For example, a person licensed as both an attorney and a CPA obviously may not serve the same client as both legal counsel and independent auditor, because of the different professional roles of counsel (as advocate and adviser) and auditor (as independent examiner). The dual licensee must therefore decline to accept engagements that would violate this principle, while remaining free to accept the wide range of other engagements in which attorney-CPAs may properly and usefully serve their clients. But the need to decline certain engagements has no bearing on the right of a person licensed as both an attorney and a CPA to use these credentials as a means of public identification. A dual licensee cannot feasibly be required to describe the need to decline certain engagements when publicly listing professional credentials.

Dual licensees face other issues, some of them more complex. One source of complexity arises because in Florida, as in all other states, attorneys are regulated by the state Supreme Court while CPAs are regulated by the Board, an administrative agency. In the event of conflict between these two sources of regulation, issues may arise under the separation of powers provision of the state constitution. The potential emergence of these issues, however, has no bearing on Ibanez's right to identify herself truthfully as an attorney and a CPA. And in listing her professional credentials, Ibanez cannot feasibly be required to describe or discuss issues such as separation of powers.



### C. The Board Improperly Bases Its Decision on Speculation That Ibanez, in the Conduct of Her Law Practice, May Violate the Board's Rules on the Management of Public Accounting Practices

The Board's order speculates that Ibanez, in the conduct of her law practice, may violate its rules on the management of public accounting practices. Mere speculation, however, is not a sufficient justification for restricting Ibanez's commercial speech.

If the Board has sufficient reason to do so, it may bring formal charges against Ibanez, accusing her of past or continuing violations of specific rules on the management of public accounting practices. She will then receive the elaborate procedural protections of the Florida Administrative Procedure Act as well as the due process guarantees of the state and federal constitutions. In these proceedings she will have the opportunity to raise her defenses, including any appropriate challenge to the Board's jurisdiction to enforce its rules against the law practice of a CPA who is not engaged in the practice of public accounting.

If the Board finds, in such proceedings, that it has jurisdiction over Ibanez's law practice, and that Ibanez has indeed violated specific rules, the Board may impose the discipline authorized by statute, subject to judicial review. If that discipline consists of the revocation of her license, she will then be prohibited from identifying herself as a CPA. Until then, Ibanez is a CPA and is entitled to identify herself as one.

## II. THE BOARD CHILLS THE FIRST AMENDMENT RIGHTS OF ATTORNEY-CPAs AND OTHER MULTIPLE LICENSEES

The Board's action against Ibanez has a chilling effect on the First Amendment rights of attorney-CPAs and other multiple licensees. Experience has shown that the public interest can be effectively protected without impairing the First Amendment rights of practitioners. Consequently, the Board's restriction of commercial speech is not narrowly tailored to serve a valid state interest.

### A. The Board Chills the Right of Attorney-CPAs to List Their Professional Credentials Truthfully

During the 30 years of AAA-CPA's existence as well as in earlier times, attorney-CPAs have faced two types of restrictions – on their right to practice both professions and on their right to identify their credentials in both professions. Gradually, the contours of an appropriate regime for multiple licensees have emerged. Although some restrictive attitudes remain, the current consensus reflects a significant trend toward the greater accommodation of multiple licensees.

The Florida Board's action against Ibanez signals a return to the restrictive policies of the past. These policies have been abandoned by bar regulators (in Florida as well as elsewhere) and by accounting regulators (in other states, but not in Florida).

If the Florida Board's action is allowed to stand, attorney-CPAs in Florida will not be able to list their CPA credentials unless they accept the Board's jurisdiction to



enforce the entire accountancy law against their law practices. This will be the result even for attorney-CPAs who, like Ibanez, choose to limit themselves to the practice of law.

As stated in the Board's order in this case, compliance with the accountancy law requires, among other matters, registration as a CPA firm, foregoing certain types of remuneration (such as contingent fees), and limiting the ownership of the firm to other CPAs. J.A. at 185. By demanding compliance with the accountancy law as the price to pay for listing one's CPA credential, the Board seeks to transform a law practice into a fully regulated accounting firm merely because an attorney-CPA lists her CPA credentials. This is an intolerable burden to place on the exercise of commercial speech. It will chill the exercise of First Amendment rights by attorney-CPAs. It will, in addition, tend to discourage practitioners who currently hold one professional license from seeking to qualify for a second license in another profession. The public interest is disserved by sapping ambition from those who wish to expand their professional qualifications.

The Board's burden on commercial speech is not only intolerable; it is also completely unnecessary. Experience shows that effective regulation is possible without imposing this burden on commercial speech.

### B. Bar Regulators and Other States' Accounting Regulators Effectively Protect the Public Interest Without Chilling the First Amendment Rights of Attorney-CPAs

Until 1980, the restrictions against attorney-CPAs came primarily from the American Bar Association (ABA). Since then, the restrictions have come from the accountancy boards of a few states, primarily Florida, while other states have reached reasonable accommodations with attorney-CPAs.

#### 1. ABA abandoned its repressive policies toward CPAs in 1980

Starting in 1932, ABA interpretations of the 1908 Canons of Professional Conduct prohibited attorneys from engaging in other businesses. ABA Informal Op. 1422 (1978) (historical summary). The clear purpose of these prohibitions was to prevent the non-law business from "feeding" clients to the law practice.

Many states chose to ignore the ABA's position on this issue. See, for example, New York County Lawyers' Ass'n. Committee on Professional Ethics, Answer to Question 388 (1949), 122 N.Y.L.J. 1088 (1949), 89 J. Acctcy. 71 (1950) (allowing attorney-CPAs to practice both professions in the same office, noting this result was contrary to ABA opinions). In support of the New York County ethics opinion, a commentator observed:

> The combination in one person of the functions of lawyer and accountant, representing the ultimate degree of cooperation between the two professions, would give the client the advantage of more continuous and timely professional supervision. This feature would seem especially valuable to the small businessman who can afford only limited professional assistance.



Note, *Attorneys Who Are Also Certified Public Accountants May Properly Practice Both Professions in the Same Office*, 63 Harv. L. Rev. 1457, 1458 (1950).

The ABA adopted the Model Code of Professional Responsibility in 1969 (effective January 1, 1970). The Model Code included a Disciplinary Rule, DR 2-102(E), representing a significant departure from the ABA's prior position. DR 2-102(E) allowed an attorney to engage in another profession or business, subject to one proviso – the lawyer could not identify the other business or profession on the letterhead, office sign, or professional card of the law practice, nor could the lawyer be identified as a lawyer in any publication in connection with the other business or profession. Thus the ABA Model Code permitted dual practice but prohibited identification as a dual practitioner.

In 1977 this Court decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), conferring First Amendment protection on certain types of advertising by lawyers. In the aftermath of Bates, the ABA overhauled its rules on advertising. At first DR 2-102(E), prohibiting identification as a dual licensee, was left intact. In 1980, however, the ABA repealed DR 2-102(E), apparently in the belief that the rule was incompatible with *Bates*. ABA, Proceedings of 1980 Mid-Year Meeting, 105 *ABA Annual Reports* 287, 341 (1985).

The ABA Model Rules of Professional Conduct, adopted in 1983 to replace the Model Code, include no

prohibition against identification as dual licensee. ABA Informal Op. 83-1497, n.2 (1983) (commenting on this aspect of the then-pending Model Rules).

State courts and bar ethics committees have generally adopted the permissive stance now taken by the ABA.[2]

During the past decade, dual licensees have encountered few if any restrictions from bar regulators. Significantly, The Florida Bar has not objected to Ibanez's identification as CPA and CFP in the telephone yellow pages under the heading "Attorneys." Only the Florida Board of Accountancy objects; the Board's reprimand precipitated the present lawsuit.

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[2] Examples include: Mass. Bar Ass'n. Committee on Professional Ethics, Op. No. 82-2 (Dec. 1982), THE ATTORNEY-CPA, Winter 1983, at 1 (references to a lawyer's dual professional status as an attorney and certified public accountant on his business card do not violate rules governing lawyers); Mich. Bar Committee on Professional and Judicial Ethics, Op. CI-795 (1983), THE ATTORNEY-CPA, Summer 1983, at 7 (a certified public accountant who is also an attorney may list both licenses on his professional card, letterhead and office sign); Texas State Bar Assn. Op. 406 (1983), THE ATTORNEY-CPA, Winter 1984, at 1 (a lawyer who is also a CPA may show the accounting qualification on his law firm's letterhead and on his professional card); New Jersey Advisory Committee on Professional Ethics, Op. 589 (1986), 22 THE ATTORNEY-CPA, No. 3, Sept./Oct. 1986, at 1 (the designation "C.P.A." may be used on the letterhead of an attorney who is also a certified public accountant – overruling contrary conclusion in Op. 447 [1980], because State Supreme Court repealed rule on which Op. 447 was based).



**2. Three states exempt attorneys from accountancy act**

While Florida leads the nation in repressing the truthful speech of CPAs, other states accommodate attorney-CPAs in varying degrees.

Three states have enacted statutes declaring that the accountancy law does not apply to an attorney in connection with that person's law practice.[3]

These statutes respect the separation of powers of their respective state constitutions, leaving the state courts to regulate the practice of law while the state boards of accountancy regulate the practice of public accounting. AAA-CPA is not aware that any of these states have suffered any danger to the public interest, or have even received any complaints, resulting from these statutes.

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[3] Calif. Bus. & Prof. Code Sec. 5053 (1990): "Nothing herein shall be deemed to be applicable to an attorney at law in connection with his practice." [in Division 3, Professions and Vocations, Chapter 1, Accountants].

Mich. Comp. L. Ann. Sec. 339.711 (1992): "This article shall not prevent the following: . . . (c) A practicing attorney from preparing reports or presenting records customarily prepared by an attorney in connection with the attorney's professional work." [in Article 7, Public Accounting].

Wis. Stat. Ann. Sec. 442.02(8) (1988): "Nothing contained in this chapter shall apply to a practicing attorney who, in connection with his or her professional work renders any accounting service." [in Ch. 442, Accounting Examining Board].

### 3. Accounting regulators in many other states have reached practical accommodations with attorney-CPAs

In 1946, the American Institute of Accountants ("AIA," predecessor of the American Association of Certified Public Accountants, "AICPA") endorsed the right of attorney-CPAs to practice both professions. American Institute of Accountants, Committee on Professional Ethics, *Official Text*, May 8, 1946, 83 J. ACCTCY. 171 (1947). At the time, AIA prohibited CPAs from advertising, as did state boards and voluntary societies of CPAs throughout the country.

After *Bates*, states could no longer prohibit advertising. After an extended dispute with the Federal Trade Commission, AICPA entered into a consent decree in 1990, agreeing to refrain from taking any action restricting or interfering with "[t]he solicitation of any client by any means . . . " FTC, Notice of Consent Decree (American Institute of Certified Public Accountants), 55 Fed. Reg. 40944 (Oct. 5, 1990).

On the basis of AAA-CPA's anecdotal knowledge, it appears that many states have developed reasonable accommodations with attorney-CPAs, reflecting a combination of the 1946 AIA policy and this Court's First Amendment case law. The Florida Board's action in the present case is not supported by any reported precedent, and is clearly out of step with the prevailing approach taken by other state boards.



### 4. Uniform Accountancy Act and Proposed Rules have attracted new attention to regulation of attorney-CPAs

Interest in the relationship between state boards of accountancy and attorney-CPAs was recently heightened by publication of the Uniform Accountancy Act. American Institute of Certified Public Accountants & National Association of State Boards of Accountancy, *Uniform Accountancy Act* (1992), 1 C.C.H. Accountancy L. Rptr. par. 1031 (looseleaf). In October 1993, the same organizations invited comments on Proposed Rules to Accompany the Uniform Accountancy Act. The Uniform Accountancy Act and the Proposed Rules are now under serious consideration in a number of states.

#### a. "Holding out" under Uniform Act and Proposed Rules

The Uniform Accountancy Act purports to apply, in its entirety, to CPAs who are engaged in the practice of public accountancy. Section 3(g) includes a definition of the practice of public accountancy that relies on a "holding out" rule.[4] The Proposed Rules to accompany the

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[4] Section 3(g) of the Uniform Accountancy Act defines "Practice of (or practicing) public accountancy" to mean "the performance or the *offering to perform* by a person or firm *holding itself out to the public* as a licensee, for a client or a potential client, of one or more kinds of services involving the use of accounting or auditing skills, including the issuance of reports on financial statements, or of one or more kinds of management advisory, financial advisory or consulting services, or the preparation of tax returns or the furnishing of advice on tax matters." (emphasis added)

Uniform Act define "holding out" to include any listing, letterhead, or other representation of the fact that a licensee holds a certificate.[5]

### b. AAA-CPA critique

These Proposed Rules give cause for concern. In context of the Uniform Act, they purport to make the entire accountancy law apply to licensees who merely identify themselves as CPAs, even if those licensees render no accounting services at all, or render accounting services only incidentally in connection with the practice of law or another profession. Further difficulty arises in defining "accounting services," especially with regard to the many overlapping areas between the practice of law and the practice of accounting.

In December 1993, AAA-CPA submitted comments and suggestions to AICPA and the National Association of State Boards of Accountancy ("NASBA"). American Association of Attorney-Certified Public Accountants, Committee on Cooperation Between the Professions of Accountancy and Law, *Comments on Uniform Accountancy Act (1992) and Proposed Rules to Accompany the Act (1993),*

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[5] AICPA/NASBA Proposed Rules to Accompany Uniform Accountancy Act, Exposure Draft Oct. 1, 1993, Rule 3-3: "Holding out" includes "any representation of the fact that a licensee holds a certificate . . . [A] representation shall be deemed to include any oral or written communication conveying the fact that the licensee holds a certificate . . . , including without limitation the use of titles or legends on letterheads, business cards, office doors, advertisements and listings."



29 THE ATTORNEY-CPA, No. 5, at 6 (Year End 1993) ("AAA-CPA critique").

The AAA-CPA critique suggests some alternative standards or concepts, without attempting to put them into statutory or regulatory language. According to the AAA-CPA critique, in summary: "[A] CPA [should] be partially exempt from the Uniform Accountancy Act if the CPA (1) does not perform accounting services at all, or (2) performs such services only incidentally to the practice of law. Further, we suggest a narrow definition of 'perform,' so that the term will not include merely identifying oneself as a CPA." *Id.*

The AAA-CPA critique is noted here to illustrate the type of dialogue that should take place in order to develop a reasonable regulatory framework for attorney-CPAs and other dual licensees. Instead of contributing to this developmental process, however, the Florida Board has chosen to repress the commercial speech of a dual licensee.

### 5. Florida position is more repressive than Uniform Act and Proposed Rules

Even the Uniform Accountancy Act and the AICPA/NASBA Proposed Rules do not support the position of the Florida Board in the present case. The AICPA/NASBA Proposed Rules address the question of a board's regulatory jurisdiction, suggesting that a CPA who advertises her credentials is subject to regulation by the state board of accountancy.

The Florida Board, in contrast, has gone much further. In an effort to assert its jurisdiction over Ibanez's law practice, the Board has reprimanded Ibanez for the so-called "deceptive" listing of her CPA credential. Thus the Board has equated its claim to exercise jurisdiction with its claim to repress the truthful and verifiable listing of Ibanez's CPA credential. The AICPA/NASBA Proposed Rules do not remotely support the Florida Board's action in this case.[6]

### C. The Board Can Accomplish Its Legitimate Regulatory Purposes Without Impairing First Amendment Rights

The Board has ample means for accomplishing its legitimate regulatory purposes without impairing Ibanez's First Amendment rights.

#### 1. Board has power to prohibit deceptive speech, but has misused that power in this case

The Board's power to prohibit deceptive speech is clearly based on a legitimate regulatory interest. The

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[6] The Board's position is vigorously supported by Lloyd "Buddy" Turman & Kenneth R. Hart, *When You Say You're A CPA, You Must Play By The Rules . . . All The Rules*, 29 THE ATTORNEY-CPA, No. 1, at 6 (Winter 1993), *reprinted from* Florida CPA Today, Oct. 1992, at 8. (Mr. Turman is Executive Director of the Florida Institute of Certified Public Accountants; Mr. Hart is General Counsel of the same organization.)

Two of the authors of the present amicus curiae brief wrote criticisms of the Turman/Hart article: Sydney S. Traum, *The Public's Right to Know*, 29 THE ATTORNEY-CPA, No. 1, at 6 (Winter 1993); Philip D. Brent, *Is the FICPA Playing By The Rules?*, 29 THE ATTORNEY-CPA, No. 2, at 7 (Spring 1993).



Board, however, violated Ibanez's First Amendment rights by a completely unjustified exercise of this power – the imposition of discipline for the so-called "deceptive" listing of truthful and verifiable information about her professional credentials.

The Board persists in attempting to justify its disciplinary action against Ibanez, apparently ignoring two recent cases which struck down the Board's violations of First Amendment rights: *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792 (1993) (Board's anti-solicitation rule held invalid as applied to truthful, non-coercive solicitation in the business context); *Dep't. of Professional Regulation, Board of Accountancy v. Rampell*, 621 So.2d 426 (Fla. 1993) (Board's anti-competitive bidding rule held invalid).

#### 2. Board's interest in regulating law practice of CPA is questionable

In addition to regulating deceptive speech, the Board has other legitimate interests in regulating the profession of public accounting. The Board's interests are at their highest level as regards CPAs who are engaged full-time in rendering accounting services to the public. The Board's regulatory interest decreases as regards CPAs who do not practice public accounting at all, or who do so only as an incident to the practice of another profession. The precise scope of the Board's legitimate interest in regulating Ibanez's law practice is a question of state law.

### 3. Board has avoided any direct test of its asserted jurisdiction over law practice of CPA

As noted above, the Board has not brought disciplinary proceedings accusing Ibanez of conducting her law practice in a manner that violates the Board's rules on the management of public accounting practices. Accordingly, the Board has not given the Florida courts an opportunity to determine the scope of the Board's jurisdiction over the law practice of a CPA. Neither has the Board initiated any declaratory proceedings that could resolve the matter.

Instead of directly testing its asserted jurisdiction to regulate Ibanez's law practice, the Board seeks to do so indirectly. The Board has had a longstanding dispute with Ibanez regarding the extent of the Board's jurisdiction to regulate her law firm. Rather than bring this dispute to a judicial test, however, the Board seeks to achieve its purposes in another way – by reprimanding her for so-called "deceptive" listing of her credentials. The Board calls this listing "deceptive" solely because the public may misunderstand the scope of the Board's jurisdiction. Thus the Board misuses its power to regulate deceptive speech, thereby violating Ibanez's First Amendment rights.

### 4. Board has not used rulemaking to clarify its jurisdiction completely

The Board may clarify the scope of its jurisdiction by amending the definitions and exemptions contained in its rules.[7]

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[7] Fla. Stat. Ann. Sec. 473.304(1) (1991) "The Board shall adopt all rules necessary to administer this Act."



The Board has adopted rules defining the scope of the Act and conferring exemptions.[8] The Board's rule conferring these exemptions was adopted, in part, as a response to *Cenac v. Florida State Board of Accountancy*, 399 So.2d 1013 (Fla. 1st Dist. Ct. App. 1981). Among other matters, the *Cenac* court recognized the Board's power to define "Florida practitioner" so as to render a licensee partially exempt from the Act if that person did not "hold out" as a CPA.

Having already adopted rules conferring partial exemption from the Act on CPAs who do not "hold out," the Board is clearly authorized to adopt additional rules, conferring partial exemption on other categories of licensees. It has not done so.

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Fla. Stat. Ann. Sec. 473.323(2) (1991) "The Board shall specify, by rule, what acts or omissions constitute a violation of subsection (1) [grounds for disciplinary action]."

[8] Fla. Admin. Code, Rule 21A-20.011. Practice of, or practicing public accountancy. "Practice of, or practicing public accountancy" as defined in Sec. 473.302(4), F.S. shall exclude any of the following:

(1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or

(2) Activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or

(3) Activities of licensees who do not hold themselves out as certified public accountants."

#### 5. Board's rule defining "holding out" was held invalid

In connection with the rule conferring partial exemption on CPAs who do not "hold out," the Board adopted another rule, Fla. Admin. Code, Rule 21A-20.012, defining "holding out." This definitional rule was held invalid by an independent hearing officer in *Ibanez v. Board of Accountancy*, Fla. Div. of Admin. Hearings, Case No. 91-3336R (Jan. 15, 1992) (noted in Board's order, J.A. at 182, n. 4). The Board could have appealed this decision to the Florida courts, or could have adopted a revised rule, but the Board did neither.

In summary, the Board has failed to clarify its own jurisdiction to regulate the law practices of CPAs, and the Board has avoided any step that would give the Florida courts an opportunity to address this issue. Instead, the Board has disciplined Ibanez for so-called "deceptive" advertising, consisting of the truthful and verifiable listing of her professional credentials.

### D. Board Chills the Rights of Other Multiple Licensees

This brief has focused on the individual who is dually licensed as an attorney and a CPA. The significance of the present case goes further, extending to any individual who is licensed in more than one profession.

The ABA's restrictions on dual practice (until 1970) and dual identification (until 1980) applied to lawyers who engaged in *any other* business or profession. See, for



example, ABA Informal Op. 1248 (1972) (lawyer-psychologist), ABA Informal Op. 83-1497 (1983) (lawyer-physician), ABA Informal Op. 1422 (1978) (lawyer in another profession or business); ABA 1980 Mid-Year Proceedings, supra (lawyer-Ph.D.). While the ABA no longer imposes these restrictions, this history illustrates various other professions in which lawyers have engaged.

## III. THIS COURT SHOULD MAINTAIN AND CLARIFY ITS PROTECTION OF COMMERCIAL SPEECH

The public interest is well served by this Court's protection of commercial speech. This Court should maintain that protection and clarify its scope.

### A. This Court's Protection of Commercial Speech Continues to Serve the Public Interest

This Court's decisions in *Bates* and subsequent cases recognize the First Amendment right of lawyers and members of other professions to advertise, provided the advertisement relates to lawful conduct and is not deceptive or coercive. These cases serve the public interest by assuring the free flow of commercial speech. At the same time, practitioners benefit from the opportunity to describe their qualifications and services.

Recently the staff of the Federal Trade Commission summarized the benefits of advertising by professionals. Such advertising:

> informs consumers of options available in the marketplace and encourages competition among firms seeking to meet consumer needs. . . .

> Advertising may sometimes be unfair or deceptive or may violate other legitimate goals of public policy. But truthful advertising is generally beneficial and procompetitive.

FTC Staff Comments, *In the Matter of Amendments to the Mississippi Rules of Professional Conduct*, FTC TODAY, Jan. 18, 1994, LEXIS pp. 9-10, *summarized in* 9 Lawyers Manual on Professional Conduct 414, 415 (1994).

### B. This Court Should Maintain the Protection of Commercial Speech, and Clarify it to the Extent Required to Provide Relief to Ibanez

This Court's prior decisions on commercial speech strongly support the right of Ibanez to prevail in this case. The Court should clarify the case law on commercial speech, to the extent needed in this case, in order to uphold the right of a licensed practitioner to list truthful and verifiable information about her professional credentials. A holding to this effect would leave the state with ample authority to accomplish its legitimate regulatory purposes by other means.

Any person who has the talent, persistence and integrity to qualify for two or more professional licenses, and to retain these licenses in good standing, is put at risk by the Board's decision in the present case. The public interest is served by allowing individuals who hold multiple licenses to practice any or all of the professions in which they are licensed, and to convey truthful and verifiable information about their credentials.[9]

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[9] See, for example, Philip D. Brent, *Accounting and Law: Concurrent Practice Is In the Public Interest*, 123 J. ACCTCY., Mar. 1967, at 38; Louis S. Goldberg, *Dual Practice of Law and Accountancy: A Lawyer's Paradox*, 1966 DUKE L. J. 117; Louis S. Goldberg, *A Lawyer's Multiple Occupations*, 6 WAKE FOREST INTRAMURAL L. REV. 191 (1970); Morris W. Primoff, *The Dual Practice of Law and Accounting and the Public Interest* (Ph.D. dissertation, Calif. Western Univ., 1977, published by AAA-CPA).



Every multiple licensee faces the possibility of multiple regulation. The scope and extent of that regulation are important issues, to be resolved in the first instance by the state regulatory authorities, subject to review by the state courts. If federal constitutional rights are at issue, this Court may ultimately grant relief.

## CONCLUSION

In this case, the Board speculates that Ibanez, in the conduct of her law practice, has violated some of the Board's rules on the management of public accounting practices. The Board, however, has not formally charged Ibanez with any such violation. Instead, the Board has reprimanded Ibanez for so-called "deceptive" listing of her CPA credential. The Board, in so doing, has placed an impermissible burden on the exercise of Ibanez's First Amendment rights.

The Board's decision, repressing truthful and verifiable identification of professional credentials, is contrary to the public interest and impairs First Amendment rights. For the reasons stated above, this Court should reverse the judgment of the Florida District Court of Appeal which, without opinion, affirmed the Board's decision.

Respectfully submitted,

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